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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. STANLEY BENNETT HINES, JR., Defendant and Appellant.	A095862 (Lake County Super. Ct. No. CR4751)

A jury found defendant guilty of first degree murder (Pen. Code, § 187, subd. (a)),[1] carjacking (§ 215, subd. (a)), kidnapping during the commission of a carjacking (§ 209.5), and robbery (§ 211). The jury also found the special circumstances that the murder occurred during the commission of a robbery, kidnapping, and carjacking (§ 190.2, subds. (a)(17)(A), (a)(17)(B), & (a)(17)(L)) and the enhancements that defendant personally used a firearm (§ 1203.06, subd. (a)(1)), personally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)), and personally inflicted great bodily injury upon the victim (§ 12022.7, subd. (a)) to be true. The trial court sentenced defendant to 25 years to life for the gun use enhancement, followed by a term of life in prison without the possibility of parole for the special circumstances murder. The court also sentenced defendant to a term of life with the possibility of parole for the kidnapping and a term of five years for the robbery.

[1] All further unspecified code sections refer to the Penal Code.

Defendant contends that the trial court committed prejudicial error by failing sua sponte to give accomplice instructions with respect to two separate witnesses and by admitting inadmissible hearsay statements into evidence. In addition, defendant asserts that the sentence violated section 654, subdivision (a). We are unpersuaded by defendant's claims.

BACKGROUND

An information filed on June 7, 1999 charged defendant of one count of murder (§ 187, subd. (a)) under the special circumstances that the murder occurred during the commission of a robbery, kidnapping, and carjacking (§ 190.2, subds. (a)(17)(A), (a)(17)(B), & (a)(17)(L)); of a second count of carjacking (§ 215, subd. (a)); of a third count of kidnapping during the commission of a carjacking (§ 209.5); and of a fourth count of robbery (§ 211). Each count included special allegations that defendant personally used a firearm (§ 1203.06, subd. (a)(1)), personally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)), and personally inflicted great bodily injury upon the victim (§ 12022.7, subd. (a)). Counts two through four also alleged that the infliction of great bodily injury was intentional (§ 1203.075).

Defendant pleaded not guilty and the case proceeded to a jury trial.

Prosecution

At the jury trial, K.W. testified as to the events that occurred on November 4, 1998. At that time, K.W. lived in the home of Roxanne W.; he was Roxanne's nephew. Also living at the house were Camille S., and several other people, including Camille's boyfriend, defendant. Jamar P. also often spent the night at the house.

During the evening of November 4, defendant and K.W. were walking by a nearby pizza place. K.W. testified that Jamar was not with them. Michael Lowry (Lowry) pulled up in his automobile and asked the two of them if they wanted to buy cigarettes for two dollars a package. Defendant wanted to buy a package, but he only had large bills and Lowry did not have any change. Consequently, Lowry agreed to drive defendant and K.W. to the nearby gas station so defendant could get change.

After defendant received change at the gas station, he gave Lowry two dollars for the cigarettes. Lowry then began driving defendant and K.W. back to the pizza parlor parking lot. While Lowry was driving, defendant pulled out a .380 semiautomatic, pointed it at Lowry, and told him to "break yourself." K.W. explained that this was slang for "give me what you got." Defendant told Lowry to drive and occasionally directed him to turn at certain intersections. K.W. asked to be let out of the car, but defendant would not let Lowry stop.

At defendant's direction, Lowry drove up a dirt trail. Lowry told defendant that he could keep the car and that he would not say anything to anyone if defendant would just let him go. Defendant commanded Lowry to stop the car near a tree; defendant got out and ordered Lowry out of the car. Lowry got out of the car and told defendant that he could have the car and that he just wanted his asthma inhaler from it. Defendant responded, "[You] won't need it." Defendant then shot Lowry, who fell to the ground.[2]

Defendant returned to the car and drove away. K.W. testified that he was too scared to run away. After getting gas for the car, defendant drove home. A number of people were in the house when they returned. K.W. told Camille that defendant was "crazy" and that he had "shot somebody." K.W. also told Roxanne about the events and that defendant killed a person. Roxanne told him to go to the police, but K.W. was too scared.

Roxanne testified that when K.W. came home that night, he told her that defendant killed Lowry because Lowry had seen his face. She also testified that sometime after he came home that night, defendant told her that he had "smoked" or "smothered" someone. She explained that both of those words were slang terms for kill. She also confirmed that defendant and K.W. had left the house together the night of November 4 and had returned together in the early morning hours of November 5. While

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[2] Lowry died from a single gunshot wound to the head; shot at close range. Markings on the .380 caliber bullet recovered from Lowry's skull were consistent with the bullet being fired from a .380 semiautomatic gun.

they were gone, she testified that Jamar came over and had been home for a while prior to the return of K.W. and defendant.

Camille testified that defendant and K.W. left together on November 4 and returned together in the early hours of November 5. She also testified that Jamar came over and was at home before defendant and K.W. returned. She also confirmed that K.W. told her that defendant was crazy and that he had just shot someone.

The following morning, defendant told Camille that he shot someone. He told her that Lowry was "looking at him funny" so he pulled out his gun and told him to give him his money and drive. He said that Lowry only had the two dollars defendant had paid him for the cigarettes. He then related the events, which were essentially the same as K.W.'s rendition.

After defendant had returned from shooting Lowry, Camille saw a gun and an unfamiliar leather wallet on the dresser in their bedroom. The wallet contained Lowry's identification, along with the pink slip to his car. Defendant later said he threw the wallet into some bushes and Camille destroyed the pink slip.

Jamar testified that on November 4 his Ford Bronco broke down in the parking lot of a grocery store and he left it there. He received a ride to Gina D.'s house, where he spent the day and evening. Sometime after midnight, Gina drove Jamar back to the grocery store. He was unable to start his car so he went over to Roxanne's house about 2:00 a.m., prior to the return of defendant and K.W. He went to sleep on the couch in the living room.

On November 5, Jamar borrowed a car starter from a friend and went to the grocery parking lot and started his car. That evening, he was driving down Old Highway 53 in Clearlake when he saw defendant standing by the side of the road trying to flag him down. Defendant asked Jamar for help pushing his car. Defendant got behind the wheel of the car and Jamar used his Ford Bronco to push the car from behind. After pushing some distance, defendant eventually steered the car through some bushes off the side of

the road and into a field. Jamar heard a loud noise and saw that the car was on fire. Defendant got into the Bronco and Jamar drove him to a store.

Tonya P. testified that defendant came over to her house at around 11:00 p.m. on the night of November 5. He told her that he needed to "lay low." A short time later, Camille and her two children took a cab over to Tonya's house and stayed there with defendant. Defendant, Camille, and the children left the next day for Alameda County, getting a ride from defendant's friend Frank A.

Frank testified that defendant came by in the afternoon of November 5 and gave him a box containing a loaded, .380 caliber semiautomatic gun. The next evening, defendant asked Frank for a ride to the Bay Area and asked for his gun back. Frank brought the gun over to Tonya's house when he came to get defendant. Defendant took the gun and wiped off any fingerprints. Frank drove defendant, Camille, and Camille's children to the Bay Area.

As soon as defendant and Camille left town, K.W. and Jamar went to the police and reported what happened. K.W.'s statements to the police were essentially the same as his testimony at trial.

While in the Bay Area, Camille testified that defendant told her that he had thrown the gun into the bay off the Berkeley Pier. Defendant, Camille, and Camille's children later stayed with Camille's aunt, Kathy F., who lived in the East Bay. Camille returned to Clearlake and defendant remained with Kathy.

Kathy testified that defendant responded as follows, after she asked him what was wrong, "Basically, for 187." She asked defendant whether he did it and he responded that he had. He told her that K.W. was with him. Defendant set forth the events, explaining that Lowry had offered to sell them cigarettes and that he pulled his gun when he returned to the car. His explanation for killing Lowry was that he did not know what else to do since he had already pulled his gun on him. At a later date, defendant told her that Jamar helped him push Lowry's car into the field. At some point, defendant and Kathy began having sexual relations. In January 1999, Camille walked into the house

and observed Kathy and defendant in bed together. Camille threatened defendant with a kitchen knife and left.

On February 26, 1999, the police arrived at Kathy's house with a warrant for defendant's arrest. They found him hiding in the crawlspace underneath the basement. In interviews with the police, defendant denied killing Lowry and said that Jamar committed the crimes.

At trial, several of the key witnesses testified about threats they received from defendant to dissuade them from testifying. K.W. testified that defendant called him before the preliminary hearing and told him not to testify. Defendant said that if K.W. went to court and testified, he would be killed. Defendant called another time and told K.W. that if he were convicted, K.W. would die. Jamar also testified that he received threatening phone calls.

Kathy received a letter[3] from defendant while he was in jail, which stated the following: "Cat, you don't got nine lives. Tell [Roxanne] I said hi and I got her address. Oh, yeah, I know where your nephew [K.W.] at, too. I got that address. I wonder how long the flies think they can fly without getting swatted. I recommend you talk to the family in case you think I am still joking . . . . [¶] . . . [¶] Talk to the family. We don't need no more mishaps and watch the kids. It is danger out there. We don't want nobody to get snatched or come up miss. Take care of my kids. Also, don't forget . . . to talk to the family because it seems like all of them are in danger . . . . [¶] . . . [¶] Oh, yea. How is your mother doing? I should send somebody over to Berkeley to tell her I said hi. . . ."

The letter also stated: "I found a way to talk to some big people in a Thug Life Association to get you kicked out of the game and maybe a kid or two. Remember, I'll find out if you expose my business, so don't break the rules. That is not nice. But talk to the family. . . . [¶] . . . [¶] I'm trying to warn you. Talk to the family. This is the last warning."

Jail officials also intercepted two letters written by defendant and addressed to his friends. The first letter stated in pertinent part: "Yah need to send a nigga a kite. Check game. This letter getting pushed out of the mail through different means. You feel? Ain't nobody seeing this but me and yah. Check game! I got trial on February 5th, 2001, 8:15 a.m. . . .

"Check game! I'm beatin my case family love one, the only thing holding me down is this snitch ass family. I need you to make an example out of somebody. You feel? It's this bitch I used to fuck with that's the auntie to the eyewitness in my case. She talking too. I need some help cousin. Everybody else acting like bitches. You know if you was crossed up, couso, I'll be the first motherfucker on the tray to ride on the fucka. I need you and Oevonne or somebody to go shoot up this bitch house. Shit, set the mutha fucka on fire or something, I ain't giving a fuck, but I will need some action to prove a new that fucka could be touch if they keep jawsin. You feel? Nigga, put the nine to use or something. I ain't trippin. I just need someone to hit this house with something they won't forget. You feel? And to give them a call later and ask for a bitch named Kathy and tell her death is next for anyone in her family if even one of them come and talks. You feel me?

"I need this bad, cousin. They the only reason I ain't touch down yet. Without them I am home free. Here's the bitch address, number, name, Kathy, . . . Berkeley . . . .

"I need this to go down as soon as possible couso. I'm trying to get back. This is my last play. Boy, I'll owe you for a lifetime on this one. That's real.

"If you feel incapable of handling it, tell Killa Cheryl. I ain't got they address. Family, this is my last play. Do this for your love one. You ain't got to shoot up the house, but I need something to happen to the house on a late night. You feel?

"Why she in it. She the bitch I drove through went. Everybody going bad on your couso. She need to be popped, but that'll come after. I touch down, they all got

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3 All the quoted references to the letter and "kite" throughout the opinion are as they appear in the original document and misspellings, grammar, and punctuation have

problems. Handle that for me love one! I'll take care of you when I touch down. That's the tray. Boy, get at me. I'll try to call soon, get at me and tell me if you handled it. *Just say yeah is handled or naw.

"Love one, this is my last chance. They trying to give your boy life without the possibility of parole! I gots to get back! Stay up boy and stay real to this shit."

The second letter was addressed to a friend in Sacramento. At this time, Camille and Roxanne had moved to Sacramento. The letter stated in relevant part: "Jessie, what's up family? I'm at you to see what's real. I need your assistance. Remember our little discussion? Here's the scoop. Check game! I need for you to let something go up out your Glock piece on these spots. Handle this for your folks and I'll pay dearly. Skrilla scratch paper $. Here's the numbers and addresses. [Addresses of Camille and Roxanne in Sacramento.]

"Tell bitch come to court her newborn baby dies! Boy get at your folks. I called one time you wasn't home. I'll holla at you when I can. Stay up out there boy. I am outy! Much love, $$ steal 2000. [¶] Get at me, make these mutha fuckas feel something and be safe out there boy. . . ."

Defense

Defendant testified, and he repeated much of what he had told the police earlier in his two interviews. He said that Jamar was with K.W. and him in Lowry's car and that Jamar pulled out the gun and shot Lowry. He testified that both K.W. and he were surprised and wanted to get out of the car. Jamar solicited defendant's assistance in disposing of Lowry's car, and defendant reluctantly agreed to help.

Defendant admitted that he had a gun, but he claimed that he had loaned it to Frank prior to the murder. He said that Frank returned the gun when he drove them to the Bay Area because he needed the gun for protection. He said that he later threw the gun away in a dumpster because he did not want the gun in the house with Camille's

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not been corrected. The text in brackets has been added.

children around. He also said that he lied to the police about going to Sacramento after the murder.

Defendant admitted writing the threatening letters to Kathy and to his friends. He claimed that he only wrote the letters because he felt hurt, betrayed, and "trapped" by the people he loved. He asserted that the letters had nothing to do with the murder of Lowry. He denied that he ever admitted killing Lowry to Camille, Roxanne, or Kathy.

Verdict and Sentence

After three days of deliberating, on May 11, 2001, the jury found defendant guilty on all counts as charged and found the special circumstances and enhancements true. The court dismissed the second count, carjacking, because defendant was convicted of kidnapping for carjacking on count three. On June 22, the trial court sentenced defendant on the first degree murder count to life without possibility of parole for the special circumstances and to 25 years to life for the gun use enhancement. The court also sentenced defendant to a term of life with the possibility of parole for the kidnapping and term of five years for the robbery. The court stayed under section 654 the sentence of 25 years to life for the gun use enhancement on the kidnapping for carjacking and robbery crimes.

Defendant filed a timely notice of appeal.

DISCUSSION

I. *Accomplice Instructions*

Defendant did not request accomplice instructions, but he now argues on appeal that the court committed prejudicial error by failing to give sua sponte accomplice instructions CALJIC Nos. 3.11 and 3.18 in connection with K.W. and Jamar. CALJIC No. 3.11 admonishes: "You cannot find a defendant guilty based upon the testimony of an accomplice unless that testimony is corroborated by other evidence which tends to connect the defendant with the commission of the offense." CALJIC No. 3.18 warns: "To the extent that an accomplice gives testimony that tends to incriminate [the] defendant, it should be viewed with caution. This does not mean, however, that you may

arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in this case." The Supreme Court has held that "[w]hen there is sufficient evidence that a witness is an accomplice, the trial court is required on its own motion to instruct the jury on the principles governing the law of accomplices," including the need for corroboration. (*People v. Frye* (1998) 18 Cal.4th 894, 965-966.)

CALJIC No. 3.10 defines an accomplice as a person who is "subject to prosecution for the identical offense charged . . . against the defendant on trial" by reason of aiding and abetting or being a member of a criminal conspiracy. (See also section 1111, which defines accomplice "as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.") "The well-settled rule with respect to the provinces of judge and jury in determining whether a witness is an accomplice is: if the material facts are in dispute, the question is factual and lies in the domain of the jury; conversely, if the facts are not in dispute the question is legal and to be determined by the trial judge." (*People v. Hoover* (1974) 12 Cal.3d 875, 880.) The cautionary instruction must be given "whenever an accomplice, or a witness who might be determined by the jury to be an accomplice, testifies." (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.) The burden is on the defendant to prove by a preponderance of the evidence that a witness could be deemed an accomplice or is an accomplice as a matter of law. (*People v. Frye, supra,* 18 Cal.4th at pp. 967-969.)

With regard to K.W., defendant argues that because K.W. was in the car with Lowry when he was kidnapped, robbed, and murdered and because he invoked his Fifth Amendment privilege against self-incrimination until provided immunity by the prosecution for his testimony, there was substantial evidence to require an accomplice instruction. However, "'[t]he weight of authority and sound law require proof that an aider and abettor act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission

of, the offense.'" (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90-91.) A person's presence at the scene of the crime or the person's failure to prevent its commission is insufficient to establish aiding and abetting. (*Id.* at p. 90.) Here, the record contains no evidence that K.W. acted with guilty knowledge with the purpose of aiding and abetting defendant. Indeed, defendant, himself, testified that K.W. was surprised about the shooting and requested to be let out of the car. Defendant may have maintained that Jamar killed Lowry, but he never implicated K.W. as encouraging or facilitating the robbery, carjacking, or murder. Further, the grant of immunity is not sufficient by itself to warrant giving accomplice-testimony instructions. (*People v. Daniels* (1991) 52 Cal.3d 815, 867.)

We therefore conclude that the record contains no admissible evidence that K.W. was more than an eyewitness to the crimes. Accordingly, the court did not err in failing to give an accomplice instruction in connection with K.W.

With regard to Jamar, defendant told the jury that Jamar committed each of the crimes, and, therefore, he claims the court should have given CALJIC Nos. 3.11 and 3.18. The People respond that the evidence was either that Jamar was not at the murder scene or, under defendant's version, Jamar committed the murder, robbery, and carjacking. Thus, the facts did not support an accomplice theory, but a theory that Jamar either committed the crimes or he did not.[4]

Even if we presume that the accomplice instructions should have been given in connection to Jamar, we conclude that any error was harmless. Defendant asserts that the failure to give such an instruction constitutes a violation of due process and therefore should be judged under the federal *Chapman* error (*Chapman v. California* (1967) 386 U.S. 18, 24). However, our Supreme Court has held that we use the harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 836. (See, e.g., *People v. Lewis* (2001) 26 Cal.4th 334, 371.)

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[4] The People acknowledge that they have not found a case that *directly* addresses this situation.

Section 1111 provides, in pertinent part: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. . . ." *People v. Zapien* (1993) 4 Cal.4th 929, 982, overruled on another issue in section 190.41, explains: "'[T]he failure to instruct on accomplice testimony pursuant to section 1111 is harmless where there is sufficient corroborating evidence in the record. [Citations.] The requisite corroboration may be established entirely by circumstantial evidence. [Citations.] Such evidence "may be slight and entitled to little consideration when standing alone. [Citations.]"' [Citation.] 'Corroborating evidence "must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged." [Citation.]' [Citation.]"

Here, there was sufficient corroborative evidence. Jamar's testimony was corroborated by defendant's own, separate, admissions to Kathy, Camille, and Roxanne. Further, K.W. testified that he saw defendant kill Lowry. As soon as defendant left the county, K.W. voluntarily went to the police to tell them that he had seen defendant kill Lowry. Further, Jamar had an alibi for the time of the offense, and the people in Roxanne's house reported seeing defendant and K.W. leave the house together the night of the murder and return together. Not only did they report that Jamar was not with them at those times, they stated that Jamar returned to the house the night prior to the arrival of defendant and K.W. Finally, defendant's consciousness of guilt was amply established when he told Tonya the night after the murder that he had to "lay low"; he fled the county; he hid from the police for several months; he disposed of his gun; and he wrote threatening letters to Kathy and to his friends asking them to harm the witnesses who were to testify against him at trial.

Accordingly, even presuming that the court should have provided the accomplice instructions with regard to Jamar, we hold that giving the instruction would not have

made it reasonably probable that defendant would have received a more favorable verdict on the charges (see *People v. Box* (2000) 23 Cal.4th 1153, 1209; *People v. Watson*, *supra,* 46 Cal.2d at p. 836). Thus, any alleged error was harmless.

II. *Admission of K.W.'s Statement to Camille*

At trial, Camille testified that K.W. told her that defendant was crazy and that defendant killed Lowry. The court ruled that the statement was admissible under Evidence Code section 791, because it was being offered as a prior consistent statement to support K.W.'s credibility. The defense had implied that K.W. and Jamar had met prior to going to the police and both had agreed upon the story to tell the police. Defendant maintains that these statements were inadmissible hearsay and the court committed prejudicial error by admitting this hearsay testimony.

Even if we were to presume that these statements were inadmissible hearsay, defendant has failed to establish prejudice. Defendant argues that K.W. was the prosecution's chief witness and he was the only eyewitness; thus, his credibility was pivotal to the prosecution. Consequently, defendant argues that this testimony that bolstered his credibility must have been prejudicial.

Here, however, the evidence against defendant was overwhelming. As discussed *ante,* defendant told a number of people that he had killed Lowry. Camille testified that she saw a gun and Lowry's wallet on the dresser in the bedroom that she shared with defendant. In addition, defendant fled, admitted disposing of a gun, and wrote threatening letters to witnesses. Accordingly, there is no reasonable likelihood that defendant would have received a more favorable outcome had the court excluded Camille's statement that K.W. had admitted to her that he had killed Lowry.

III. *The Sentence*

The trial court sentenced defendant on count one, the first degree murder, to life without possibility of parole for the special circumstances and to 25 years to life for the gun use enhancement. For count three, kidnapping during the commission of a carjacking, the court sentenced him to a term of life with the possibility of parole and

stayed under section 654 the 25 years to life for the gun use enhancement. For count four, robbery, the court sentenced him to five years and stayed under section 654 the 25 years to life for the gun use enhancement. Defendant argues that the court should have stayed the sentences on counts three and four pursuant to section 654.

Section 654, subdivision (a) provides: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

"[T]he application of section 654 to any particular case depends upon the circumstances of that case. 'The initial inquiry in any section 654 application is to ascertain the defendant's objective and intent. If he entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.] Whether the defendant maintained multiple criminal objectives is determined from all the circumstances and is primarily a question of fact for the trial court, whose finding will be upheld on appeal if there is any substantial evidence to support it." (*People v. Porter* (1987) 194 Cal.App.3d 34, 38.) "Although the question of whether defendant harbored a 'single intent' within the meaning of section 654 is generally a factual one, the applicability of the statute to conceded facts is a question of law. [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

Defendant argues that the jury found him guilty of murder during the commission of a kidnapping, carjacking, and robbery, but also found that he committed the murder in furtherance of the underlying felonies. Therefore, the kidnapping, carjacking, robbery were the very acts that made the homicide first degree murder and the court could not sentence him under section 654, subdivision (a) on counts three and four. (See also

People v. Boyd (1990) 222 Cal.App.3d 541, 576 (*Boyd*); *People v. Mulqueen* (1970) 9 Cal.App.3d 532, 547-548 (*Mulqueen*).)

The special circumstances of murder during the commission of a robbery, carjacking, and kidnapping, which the jury found true are broader than the limitations imposed by section 654. These special circumstances can be found true if "[t]he murder was committed while the defendant was engaged in . . . the commission of, attempted commission of, or the immediate flight after committing the following felonies[.]" (§ 190.2, subd. (a)(17).) Thus, a jury can find the special circumstances of committing murder during the course of kidnapping, carjacking, and robbery true, even when the defendant harbored a different intent at the time of the murder, namely to facilitate escape or to avoid detection.

The section 654 limitation imposed in *Mulqueen* and *Boyd* only applies when the record contains no evidence to support a finding that the murder was premeditated and was committed with a separate intent than the underlying felonies. (E.g., *People v. Osband* (1996) 13 Cal.4th 622, 730-731.) Here, defendant was charged with first degree murder under alternate theories of felony murder and premeditated and deliberate murder and the record does not reflect which theory the jury selected in convicting defendant. The court, however, made an express finding that defendant harbored different intents at the time he committed the initial robbery, the subsequent kidnapping and carjacking, and ultimately the murder. Evidence in the record indicates that defendant killed Lowry after he had committed the other crimes of robbery, kidnapping, and carjacking. Further, defendant told one person that he killed Lowry because Lowry had seen his face; thus, these facts indicated that he killed him with the purpose of eliminating a witness and thereby escaping detection. Accordingly, substantial evidence supported the court's finding of separate intents and the court did not commit error under section 654, subdivision (a).

In addition, defendant contends that the court's statements make it unclear whether the court intended the sentences on counts three and four to run concurrent with or

consecutive to count one. When sentencing defendant, the court stated in pertinent part: ". . . First of all, I'm satisfied that the provisions of Penal Code section 654 do not apply to counts three and four vis-à-vis count one, and accordingly, the defendant will be sentenced on all three counts with none of the sentences stayed pursuant to that section. However, I do view the theft offenses and the murder as being part and parcel of a single atrocious period of aberrant behavior, and for that reason, I'm going to sentence on counts one, three, and four consecutively . . . ." Subsequently, the court stated that the prison terms imposed on counts one, three, and four shall be served "concurrently." It continued: "It's further the judgment of the court that the five year determinate term on count four be served first, followed by the 25 to life term on the enhancement to count one, followed by the indeterminate terms on counts one and three."

Since the court first stated that the sentences were to be consecutive and then said they were going to be concurrent, defendant argues it is impossible to determine the court's intention regarding the sentence. As the People note, there is no reason to remand because it really does not matter whether the sentences for counts three and four run concurrent with count one or consecutively to it given the sentence of life without parole on count one. Accordingly, to the extent that the abstract of judgment does not clearly reflect that counts three and four are to run concurrent with count one, but consecutive to each other and to the gun use enhancement, we order it modified to so reflect.

DISPOSITION

We modify the sentence imposed to reflect that the sentence for counts three and four are to run concurrent with count one, but consecutive to each other and to the gun use enhancement. The trial court is directed to prepare an amended abstract of judgment reflecting this modification and forward it to the Department of Corrections. In all other respects, the judgment is affirmed.

Lambden, J.

We concur:

Kline, P. J.

Ruvolo, J.